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NOTES

MINE EYES HAVE SEEN THE GLORY: SIR THOMAS BROWNE AND THE LAWYER'S QUEST FOR GOD

JOHN F. ROMANO[†]

INTRODUCTION

The intersection of religion and the law is a topic of continuing interest to lawyers and the public alike. Our system of government was established to ensure that religion and politics would not become intertwined.¹ Despite this, most would recognize that religion plays an integral part in the lives of those who comprise the governmental institutions of this country.² Although the topic of the impact of faith and religion on the government is an interesting one,³ this paper instead analyzes the issue from the other side of the spectrum—the influence of one's

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¹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); *see also* *United States v. Lynch*, 162 F.3d 732, 735 (2d Cir. 1998) ("That seal above my head says . . . this is Caesar's court. This is not a church, this is not a temple, this is not a mosque. And we don't live in a theocracy. This is a court of law." (quoting *United States v. Lynch*, No. 96-6137, 1996 U.S. App. LEXIS 32729, at *4-5 (2d Cir. Dec. 11, 1996))) (alteration in original).

² *See, e.g.*, Jeffrey Gettleman, *Alabama Panel Ousts Judge Over Ten Commandments*, N.Y. TIMES, Nov. 14, 2003, at A16 (reporting that Alabama Chief Justice Roy Moore was ousted by an ethics panel after refusing to remove a monument to the Ten Commandments that he had installed in the state judicial building); *see also* Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1255 (1998) (stating that religious lawyers will be influenced by their religion just as much as by codes of ethics).

³ *See, e.g.*, Griffin, *supra* note 2, at 1266 (arguing that the religious thoughts and morals of attorneys should not be separated from their professional life because to do so "would undermine a professional ethics"). *See generally* *A Symposium Precis*, 27 TEX. TECH. L. REV. 911 (1996).

profession on one's faith in God. Inspired by the seventeenth-century masterpiece *Religio Medici* by Sir Thomas Browne, this paper will attempt to translate Browne's insight about what the medical profession can say about God to the contemporary legal professional.⁴ This paper will conclude, just as Browne concluded with respect to the medical profession,⁵ that through the legal system's failings and shortcomings, its participants are made privy to the existence of God.⁶

I. SIR THOMAS BROWNE: THE MEDICAL PROFESSION AND GOD

The *Religio Medici* was written by Browne during the 1630s and published in an authorized edition in 1643.⁷ Although it was a time of religious strife,⁸ Browne's work is remarkably tolerant of other faiths.⁹ He stated that he did not disagree with all the teachings of the Catholic church, and similarly did not agree with all of Calvin's teachings,¹⁰ but rather seemed most at home

⁴ SIR THOMAS BROWNE, *Religio Medici*, in THE MAJOR WORKS (C.A. Patrides ed., Penguin Books 1977) (1643). Note that Browne's work dates from 1643, and thus direct quotes taken from his work include odd spellings.

⁵ Although I use the word "concluded," it is important for the reader to note that the *Religio Medici* is not a formal philosophical treatise. In fact, critics steadfastly deny him the label of "philosopher" and instead locate his genius as that of a writer. See LEONARD NATHANSON, THE STRATEGY OF TRUTH: A STUDY OF SIR THOMAS BROWNE 4-5 (1967). This paper will argue, however, that much of Browne's thoughts were highly philosophical as well as beautifully written.

⁶ The title of this paper is taken from the first line of "Battle Hymn of the Republic," which is itself a beautiful explication of the revelation of God. The second verse of the song states: "I have seen Him in the watch-fires of a hundred circling camps;/ They have builded Him an altar in the evening dews and damps;/ I can read His righteous sentence by the dim and flaring lamps:/ His day is marching on." Julia Ward Howe, *Battle Hymn of the Republic*, THE ATLANTIC MONTHLY, Feb. 1862, at 10, available at <http://www.theatlantic.com/issues/1862feb/batthym.htm> (last visited Apr. 3, 2004).

⁷ C.A. Patrides, *Introduction* to THE MAJOR WORKS 23, 57 (C.A. Patrides ed., Penguin Books 1977) (1643).

⁸ The period was marked by religious warfare. For example, the Thirty Years' War raged from 1618-1648. See LYNN HUNT ET AL., THE CHALLENGE OF THE WEST 555, 556 (1995). In England, the 1640s witnessed a civil war that was waged in substantial part because of religious differences. See *id.* at 578-82.

⁹ See BROWNE, *supra* note 4, at 62 (stating that even though he is a Protestant, he shares with the Catholics "one common name and appellation, one faith, and necessary body of principles common to us both"); Patrides, *supra* note 7, at 24 ("Tolerant of the intolerant, he was like the Cambridge Platonists among the least contentious spirits in an age of violent strife, and among the least dogmatic in an age of aggressive and factious doctrine."). See generally NATHANSON, *supra* note 5, at 111-41 (discussing Browne's views of the differences in the various churches).

¹⁰ BROWNE, *supra* note 4, at 64.

with the title of "Christian," because "I finde my selfe obliged by the principles of Grace, and the law of mine owne reason, to embrace no other name but this."¹¹ Browne's "reason" is instrumental throughout the *Religio Medici*, and it serves as both the impetus for the work as well as Browne's primary tool for experiencing the divine.

Browne began his work by explaining his conundrum. "[T]he generall scandall of my profession, [and] the naturall course of my studies" lead the world to assume "I have [no religion] at all."¹² The title of the work makes clear that Browne was a physician,¹³ and his opening lines indicate that he felt the need to justify his profession from attack.¹⁴ Browne undertook this defense by using his "reason" and his observations as a physician to bolster his faith in God.¹⁵

Rather than simply follow authority or biblical teachings, Browne used his scientific training and his reason to find God. He wrote, "Thus there are two bookes from whence I collect my Divinity; besides that written one of God, another of his servant Nature, that universall and publik Manuscript, that lies ex-

¹¹ *Id.* at 61.

¹² *Id.* (citations omitted).

¹³ See Patrides, *supra* note 7, at 17 (indicating that Browne had a medical apprenticeship from 1633 to 1637, at which point he became a physician).

¹⁴ See C.A. Patrides, *Notes to THE MAJOR WORKS* 61 n.8 (C.A. Patrides ed., Penguin Books 1977) (1643) (noting a common proverb that 2 out of every 3 physicians was an atheist). Although the note states that the proverb was "a wild exaggeration," *id.*, there is some question whether currently the figures are not actually understated, at least as applied to scientists. See Natalie Angier, *The Scientific Method: My God Problem—and Yours*, *THE AMERICAN SCHOLAR*, Spring 2004, at 131, 133 (citing a survey that found that only 7% of scientists belonging to the National Academy of Sciences believed in a "personal God").

As will be discussed more at length *infra*, lawyers also felt the need to justify their profession. After the publication of the *Religio Medici*, a number of imitations were written, including the *Religio Jurisprudentis*. See DANIELA HAVENSTEIN, *DEMOCRATIZING SIR THOMAS BROWNE: RELIGIO MEDICI AND ITS IMITATIONS* 21, 30–31 (1999) (indicating that law was considered particularly scandalous and thus in need of justification as a noble profession). See generally NATHANSON, *supra* note 5, at 146 (stating that Browne was aware that his status as a scientist would make him vulnerable to attack as an atheist); A.H.T. Levi, *Notes to PRAISE OF FOLLY* 84, n.103 (Betty Radice trans., Penguin Books 1993) (explaining that it was quite surprising that Erasmus did not include doctors, along with lawyers, as followers of Folly, since both professions were generally satirized). Interestingly enough, however, in the *Religio Medici* itself, Browne wrote that medicine, law, and divinity were the "three Noble professions which al civil Common wealths doe honour. . . ." BROWNE, *supra* note 4, at 150–51.

¹⁵ See BROWNE, *supra* note 4, at 64 (stating that he follows scripture, his church, and his reason).

pans'd unto the eyes of all"¹⁶ Browne discussed at great length the lessons that could be learned from observing nature. Writing of the transmigration that he had observed in silkworms, Browne stated that "[t]here is in these workes of nature, which seeme to puzzle reason, something Divine, and hath more in it then the eye of a common spectator doth discover."¹⁷

Based on his studies of anatomy, Browne concluded that the body of man contained an inorganic soul, because "in the braine, which wee tearme the seate of reason, there is not any thing of moment more than I can discover in the cranie of a beast."¹⁸ He quite elegantly concluded from this discovery that "we are men, and we know not how, there is something in us, that can be without us, and will be after us, though it is strange that it hath no history, what it was before us, nor cannot tell how it entred in us."¹⁹

As his description of the soul above makes clear, despite being a scientist, Browne was remarkably willing to reveal that there was much that he did not understand about the world.²⁰ The *Religio Medici*'s answer to this was that the power of God was well beyond human understanding. Browne wrote, "I hold that God can doe all things, how he should work contradictions I

¹⁶ *Id.* at 78–79; see also NATHANSON, *supra* note 5, at 99 ("It is in the garden of created nature that Browne cultivated, with serene assurance, his best plants of divinity.").

¹⁷ BROWNE, *supra* note 4, at 110; see *id.* at 80 (stating that the "Heathens" saw God in the normal operations of nature, while "wee Christians . . . cast a more careless eye on these common Hieroglyphicks, and disdain to suck Divinity from the flowers of nature") (citation omitted); see also HENRY WADSWORTH LONGFELLOW, *Flowers*, in COMPLETE POEMS 5 (Buccaneer Books 1993). Longfellow wrote:

Wondrous truths, and manifold as wondrous,
God hath written in those stars above;
But not less in the bright flowerets under us
Stands the revelation of his love.
Bright and glorious is that revelation,
Written all over this great world of ours;
Making evident our own creation,
In these stars of earth, these golden flowers.

Id.

¹⁸ BROWNE, *supra* note 4, at 107.

¹⁹ *Id.* (declaring the body but a "wal[] of flesh" that "must fall to ashes"); see also PLATO, PHAEDO 25–27 (G.M.A. Grube trans., Hackett 1977) (discussing the immortality of the soul and attempting to show that the soul has knowledge of the universals before it enters the body).

²⁰ See BROWNE, *supra* note 4, at 99 ("I doe thinke that many mysteries ascribed to our owne inventions, have beene the courteous revelations of Spirits").

do not understand, yet dare not therefore deny."²¹ According to Browne, the power of God cannot be understood in human terms. For instance, God is deemed to be eternally present such that "to his eternitie which is indivisible, and altogether, the last Trumpe is already sounded, the reprobates in the flame, and the blessed in *Abrahams* bosome."²² In true Platonic fashion,²³ Browne viewed this eternally present God as the first cause of all things and the "reall substance" of which "this visible world is but a picture" where "things are not truely, but in equivocall shapes."²⁴

The *Religio Medici*'s most powerful argument²⁵ for the existence of God is found where this Platonic conception of God²⁶ intersects with Browne's own astute scientific observations. Although Browne did not explicitly make the argument that follows, it is clear from the *Religio Medici* what he had in mind. The argument begins, essentially, with the common idea that by

²¹ *Id.* at 95.

²² *Id.* at 72–73; see also *id.* at 73 ("[W]hat to us is to come, to his Eternitie is present, his whole duration being but one permanent point without succession, parts, flux, or division."). The idea of the eternal present was discussed at length by Boethius in his *Consolation of Philosophy*, which was written in the sixth century. Boethius wrote, "[God's knowledge] embraces all the infinite recesses of past and future and views them in the immediacy of its knowing as though they are happening in the present." BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 165 (V.E. Watts trans., Penguin Books 1969); see also KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE* 85–86 (1969) (explaining a concept of understanding time that is incredibly similar to that offered by Boethius and Browne).

²³ See Patrides, *supra* note 7, at 30–31 (discussing Browne's attitudes towards Platonism).

²⁴ BROWNE, *supra* note 4, at 74. The best explication of the theory of the forms is Plato's *Republic*. Book VII contains the famous analogy of the cave, wherein Plato compared the visible world to shadows on a wall. Plato wrote that those who cannot turn their eyes to the light and see what *is* "would hold that the truth is nothing other than the shadows of artificial things." PLATO, *THE REPUBLIC* 193–94 (Allan Bloom trans., Basic Books 2d ed. 1968).

²⁵ Despite my opinion, the passages which follow were not even discussed in Leonard Nathanson's work, *The Strategy of Truth: A Study of Sir Thomas Browne*. See NATHANSON, *supra* note 5, at 143–76 (discussing that portion of the *Religio Medici* but not discussing these particular passages).

²⁶ The best example of what I mean by this is chapter 15 of St. Anselm's masterpiece *Monologion*. In that chapter, St. Anselm explained what could be said of God's attributes. He wrote, "[J]ust as it is impious to think that the substance of the supreme nature is something that it is in some way better not to be, so he must be whatever it is in every respect better to be than not to be." ANSELM, *Monologion*, in *MONOLOGION AND PROSLOGION* 29 (Thomas Williams trans., Hackett 1995). Therefore, St. Anselm concluded that God must be "living, wise, powerful and all-powerful, true, just, happy, eternal, and whatever similarly it is absolutely better to be than not to be." *Id.*; see also Job 38:2 (New American) (giving the Lord's speech to Job, in which God states that man "obscures divine plans with words of ignorance").

seeing one thing, one is also capable of seeing its opposite. In his *Theodicy*, Gottfried Wilhelm Leibniz explained it by remarking that "[i]f we were usually sick and seldom in good health, we should be wonderfully sensible of that great good and we should be less sensible of our evils."²⁷ The thing that Browne saw, given his experience as a physician, was the frailty and vulnerability of man. In a stunningly beautiful passage, Browne wrote:

Men that looke no further than their outsides thinke health an appertinance unto life, and quarrell with their constitutions for being sick; but I that have examined the parts of man, and know upon what tender filaments that Fabrick hangs, doe wonder that we are not alwayes so; and considering the thousand dores that lead to death doe thanke my God that we can die but once.²⁸

Whereas most people take their health for granted, Browne realized the multitude of problems that could end one's life and the powerlessness of man to stop these various things from afflicting him. Further, Browne surely recognized that there is nothing about man that necessitates his very existence from moment to moment. As elegantly stated above, it is a miracle. Observing firsthand the innate weakness and vulnerability of man, Browne was able to see just the opposite in God. That is, by seeing man's weakness, he was able to see God's strength. By seeing his powerlessness to sustain himself from moment to moment, he saw God's necessity.²⁹ In what is essentially a cosmological argument for God's existence,³⁰ Browne thus concluded

²⁷ G.W. LEIBNIZ, *THEODICY* 130 (Austin Farrer ed., E.M. Huggard trans., Routledge & Kegan Paul 1951) (1700); see also PLATO, *supra* note 19, at 24 (arguing that two items that are roughly equal do not "seem to us to be equal in the same sense as what is Equal itself").

²⁸ BROWNE, *supra* note 4, at 115. Browne went on to write, "There is therefore but one comfort left, that though it be in the power of the weakest arme to take away life, it is not in the strongest to deprive us of death . . ." *Id.*

²⁹ This would certainly be a quality of God, according to St. Anselm, since it would be better to have necessary existence than to have contingent existence. See ANSELM, *supra* note 26, at 27–29; see also 2 *Corinthians* 3:5 ("Not that of ourselves we are qualified to take credit for anything as coming from us; rather, our qualification comes from God."); *John* 1:3 ("All things came to be through him, and without him nothing came to be.").

³⁰ Cosmological arguments generally posit that things with contingent natures must exist through something with a necessary existence. See generally BRIAN DAVIES, *PHILOSOPHY OF RELIGION: A GUIDE AND ANTHOLOGY* 179–244 (2000) [hereinafter DAVIES, *GUIDE AND ANTHOLOGY*] (presenting cosmological arguments and criticisms from a number of influential thinkers); BRIAN DAVIES, *AN INTRODUCTION*

that everything, including man, exists from day-to-day through the action of God. Browne wrote:

[T]here is no such thing as solitude, nor any thing that can be said to be alone, and by it selfe, but God, who is his owne circle, and can subsist by himselfe, all others besides their dissimilary and Heterogeneous parts, which in a manner multiply their natures, cannot subsist without the concourse of God, and the society of that hand which doth uphold their natures.³¹

Thus, the argument concludes that the very existence and subsistence of man, who alone cannot cause nor ensure his continuing survival, proves that God exists. Thus, instead of allowing his medical training, scientific observations, and reason to act as liabilities to his faith, Browne used these tools to strengthen his resolve that God existed³² and that "[t]here is surely a peece of Divinity in us."³³ From weakness, Browne unearthed strength.

TO THE PHILOSOPHY OF RELIGION 74–85 (2d ed. 1993) (explaining cosmological arguments).

³¹ BROWNE, *supra* note 4, at 152 (citation omitted); see also SIR THOMAS BROWNE, *Hydriotaphia*, in *THE MAJOR WORKS*, *supra* note 4, at 312 (arguing that everything but the immortal has a "dependent being"). A very famous cosmological argument for God's existence is advanced by St. Anselm in chapters 1 through 14 of his *Monologion*. In chapter 13, St. Anselm wrote, "[C]reated things remain in existence through another, and he who created them remains in existence through himself, [thus] just as nothing was made except through the presence of the creating essence, so nothing remains in existence except through his conserving presence." ANSELM, *supra* note 26, at 26. Cosmological arguments are not the product solely of Christian thinkers. See, e.g., BARUCH SPINOZA, *THE ETHICS* 49 (Seymour Feldman ed., Samuel Shirley trans., Hackett 1982) (1677) ("God is the cause not only of the coming into existence of things but also of their continuing in existence, or, to use a scholastic term, God is the cause of the being of things . . .").

Although cosmological arguments are thus quite commonplace and have been more explicitly stated by thinkers more properly characterized as philosophers than is Browne, it is this paper's assertion that Browne presents an especially appealing argument to the modern professional, because his faith was bolstered, and possibly emanated from, his experience as a professional. While, for example, St. Anselm's arguments often seem cold and overly intellectual, the reader of Browne rarely encounters detached and scholastic arguments. See *supra* note 5 (explaining that Browne is considered first and foremost a writer and not a philosopher).

³² See NATHANSON, *supra* note 5, at 47 ("So far from driving him into atheism, his scientific pursuits provide another route to faith and an additional support for it."). But see Angier, *supra* note 14, at 132–34 (displaying an extreme aversion to religion as contrary to everything that can be learned from scientific thought).

³³ BROWNE, *supra* note 4, at 153 ("Nature tells me I am the Image of God as well as Scripture . . .").

II. BROWNE AND THE LEGAL PROFESSION: FROM WEAKNESS COMES STRENGTH

A. *The Battle of the Professions: Lawyers Need to be Defended Too*

As discussed earlier, the impetus for Browne's *Religio Medici* was his desire to justify his profession as one that was not intrinsically godless, but rather as one that could strengthen one's belief in God's existence. The lessons of history as well as present-day society indicate that the legal profession could benefit from a similarly rousing defense of its existence.

Instances of misfeasance by legal professionals are legion throughout works of literature and philosophy.³⁴ Writing in the fifth century, St. Augustine painted a dreary picture of the state of earthly justice. He wrote, "[T]he judge tortures the accused for the sole purpose of avoiding the execution, in ignorance, of an innocent man; while his pitiable lack of knowledge leads him to put to death, tortured and innocent, the very person whom he had tortured to avoid putting the innocent to death."³⁵ While St. Augustine's criticism is directed primarily at the lack of knowledge of judicial actors, other writers have catalogued more pernicious behavior amongst legal professionals. For example, Erasmus, in his *Praise of Folly*, portrayed lawyers as petty, greedy, and corrupt. He wrote:

Amongst the learned the lawyers claim first place, the most self-satisfied class of people, as they roll their rock of Sisypheus and string together six hundred laws in the same breath, no matter whether relevant or not, piling up <opinion on opinion and> gloss on gloss to make their profession seem the most dif-

³⁴ Misfeasance in the profession tends to indicate a godlessness different in kind from that presumably leveled against physicians, like Browne. Browne likely needed to counteract the criticism that his reason led him to doubt in his religion. See, e.g., Angier, *supra* note 14, at 134 ("[Science] has a pretty good notion of what's probable or possible, and virgin births and carpenter rebirths just aren't on the list."). Legal misfeasance, on the other hand, tends to show behavior in violation of ethical norms, and presumably religious beliefs. Cf. Griffin, *supra* note 2, at 1255 (stating that morality and religion tend to be closely connected).

³⁵ AUGUSTINE, CITY OF GOD 859-60 (Henry Bettenson trans., Penguin Books 1984) (1467) (concluding that "judgements passed by men on their fellow-men" are "lamentable"). In these passages, St. Augustine seemed most concerned about the shortcomings of human justice versus the justice dispensed by God. This is a topic that will be discussed at length *infra*.

ficult of all. Anything which causes trouble has special merit in their eyes.³⁶

Books such as Voltaire's *Candide*³⁷ and Johann Jacob Grimmelshausen's *Simplicissimus*³⁸ similarly portrayed lawyers and judges as corrupt individuals who took advantage of trusting laymen. Even the *Religio Medici*, while offering praise for the legal profession³⁹ simultaneously poked fun at its intricacies. Browne suggested a lawsuit based on Lazarus's resurrection involving "whether his heire might lawfully detaine his inheritance, bequeathed unto him by his death; and he, though restored to life, have no Plea or title unto his former possessions."⁴⁰ All of these negative descriptions of the legal profession were surely at least partially responsible for the publication of the *Religio Jurisprudentialis*, which was an imitation of Browne's work.⁴¹

The attitudes towards the legal profession in present-day society are not much kinder than the aspersions cast throughout history. When compared to doctors, lawyers are universally deemed less ethical and trustworthy.⁴² Polls have found that a

³⁶ ERASMUS, PRAISE OF FOLLY 84 (Betty Radice trans., Penguin Books 1993) (1515) (alteration in original); cf. BROWNE, *supra* note 4, at 92 ("Some men have written more than others have spoken; *Pineda* quotes more Authors in one worke, than are necessary in a whole world."). Elsewhere, Erasmus alleged corruption among the profession. He wrote, "A good many [Pythagoreans] engage in interminable litigation, but their efforts to outdo each other all end in enriching the judge who defers judgement and the advocate who acts in collusion with his opposite number." ERASMUS, *supra*, at 77.

³⁷ VOLTAIRE, CANDIDE 89 (John Butt trans., Penguin Books 1947) (1758) (telling of how *Candide* was forced to pay a Dutch judge a large sum of money simply to hear his case and to compensate him for making too much noise).

³⁸ JOHANN JACOB GRIMMELSHAUSEN, SIMPLICISSIMUS 141-44 (S. Goodrich trans., Dedalus 1995) (1669) (explaining how *Simplicissimus* was hauled before the Judge-Advocate-General and how the latter proceeded to steal the former's money).

³⁹ See *supra* note 14 (noting that Browne declared the legal profession to be one of the three noble professions).

⁴⁰ BROWNE, *supra* note 4, at 88. Just as St. Augustine had done, Browne also noted the shortcomings of the human legal system. See *id.* at 151. This issue will be discussed at length *infra*.

⁴¹ See HAVENSTEIN, *supra* note 14, at 21-22. The author of the *Religio Jurisprudentialis* was a man named Hildesley, who was a lawyer. The book, however, while seemingly published to justify the legal profession against attacks, had little to do with the author's profession. *Id.* at 21.

⁴² See, e.g., Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 346 n.11 (1998) ("It is clear that lawyers do not have the best reputation for honesty and integrity among members of the general public.").

majority of the public distrusts lawyers,⁴³ and that their reputation for honesty and ethics falls below that for nurses, doctors, and teachers.⁴⁴

Much of this negative reputation is likely the result of the nature of the profession itself. For example, criminal defense lawyers, in particular, are employed for the purpose of obscuring the truth, rather than cooperating in the quest for some sort of objective justice.⁴⁵ When compared to doctors, the oftentimes troubling role played by lawyers is even more pronounced. One commentator posed the question: "Why is it that it seems far less plausible to talk critically about the amorality of the doctor, for instance, who treats all patients irrespective of their moral character than it does to talk critically about the comparable amorality of the lawyer?"⁴⁶ The answer presented was that the role of the respective professionals is different. Unlike the doctor, the lawyer often must make representations that he does not actually believe.⁴⁷ This role-differentiated behavior likely makes many laymen uncomfortable. Also, "it is . . . intrinsically good to try to cure disease, but in no comparable way is it intrinsically good to try to win every lawsuit or help every client realize his or her objective."⁴⁸ Thus, whether the reason for public mistrust in

⁴³ Al Lewis, *So Many Vocations to Distrust*, DENVER POST, Nov. 30, 2003, at K-01 (reporting that 51% of poll respondents distrusted lawyers, versus only 18% for doctors).

⁴⁴ Fiona Buffini, *The Decline of Ethical Behaviour*, AUSTL. FIN. REV., Apr. 19, 2002, at 57.

⁴⁵ See, e.g., W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1085-87 (1996) (explaining that most criminal defense lawyers know that their clients are factually guilty).

⁴⁶ Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975), reprinted in PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 4, 12 (4th ed. 2002).

⁴⁷ *Id.*; see Anderson, *supra* note 42, at 373 (arguing that the current jury selection system "undermines the ethical foundation of the legal profession," because it encourages attorneys to be dishonest about why they are striking potential jurors); see also ALDOUS HUXLEY, AFTER MANY A SUMMER DIES THE SWAN 297 (1939) ("[A] lawyer sells his convictions for a fee.").

⁴⁸ Wasserstrom, *supra* note 46, at 12. Although abortion has been deemed constitutionally protected for some time now, *Roe v. Wade*, 410 U.S. 113 (1973), it is interesting to question whether the undertaking of the procedure by doctors somehow undercuts the notion that everything done by doctors is intrinsically good. In fact, the traditional Hippocratic oath required that doctors declare that "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." *Id.* at 131 (quoting L. EDELSTEIN, THE HIPPOCRATIC OATH 3 (1943)). Much to this effect, Justice Kennedy declared, "A State may take measures to ensure the medical profes-

the legal professional is the result of misfeasance or the lawyer's unique role in society, it is clear that an apology similar to the *Religio Medici* would be helpful to her status in society.⁴⁹

B. Browne's Observations and the Legal Profession

As one looks at the legal profession, one must wonder exactly where the revelation of God is possible. Unlike a religious doctor who might believe that he sees God's work in the patients who he treats,⁵⁰ the religious lawyer cannot readily see God in the man-made laws that he administers and enforces.⁵¹ In fact, as discussed above, the lawyer often must obscure the truth,⁵² and the law frequently protects what amounts to obfuscation.⁵³

One might argue that the success of our judicial and legal systems reveals God's work. By creating laws that are fair and just, and by executing those laws so as to punish the guilty and exonerate the innocent, it could be argued that we have created a system of justice that perfectly mirrors that of God. This argument seems unrewarding, off-base, and remarkably hubristic. Just as Browne concluded that scientific achievements and improvements were attributable to the "courteous revelations of Spirits,"⁵⁴ the legal professional could chalk up the system's success to luck. As one very able jurist remarked:

Perhaps, some would say that our law is directly derived from absolute justice being perceived by the judges. Those who

sion and its members are viewed as *healers*, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life" Stenberg v. Carhart, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting) (emphasis added). One wonders how the public would compare lawyers to abortionists specifically, as opposed to doctors as a whole.

⁴⁹ Cf. Anderson, *supra* note 42, at 373 (positing that "the lack of public confidence in the integrity of lawyers is no laughing matter").

⁵⁰ See BROWNE, *supra* note 4, at 153 ("Nature tells me I am the Image of God as well as Scripture; he that understands not thus much, hath not his introduction or first lesson, and is yet to begin the Alphabet of man."); see also LEIBNIZ, *supra* note 27, at 51 ("The perfections of God are those of our souls, but he possesses them in boundless measure; he is an Ocean, whereof to us only drops have been granted . . .").

⁵¹ See BROWNE, *supra* note 4, at 151 ("I doe not see why particular Courts should be infallible, their perfectest rules are raised upon the erroneous reasons of Man, and the Lawes of one, doe but condemn the rules of another . . .").

⁵² See *supra* note 45 and accompanying text.

⁵³ See, e.g., U.S. CONST. amend. V (granting to the criminal defendant the right not to incriminate oneself).

⁵⁴ BROWNE, *supra* note 4, at 99 ("Wee doe surely owe the discovery of many secrets to the discovery of good and bad Angels").

would suggest that could not be further from the truth. Wearing a black robe does not assure one of getting a direct pipeline to the Almighty or even a peek at what platonists would call absolutes or ideals. Our law is the perception of the judges as to what the customs of society are—as such customs might evolve from a sense of absolute justice.⁵⁵

The strengths of our legal and judicial system, while admirable, do not in any real sense reveal God to practitioners or the public. Well-reasoned legal opinions rarely, if ever, move the reader to acknowledge and proclaim God's existence. In addition, just as success in the medical profession would not be deemed success when compared to an omnipotent God, it is hard to argue that our legal system's success can be equated with the absolute justice of God.⁵⁶

As Browne so elegantly argued with respect to the medical profession, it is through the weaknesses and shortcomings of the legal profession that the strength of God is revealed. As explained above, the *Religio Medici* located a necessary God by first observing the contingent nature of man. The same is possible with the legal profession and the concept of justice. In *The Republic*, Plato talked at length about the contrast between justice in this world and justice *itself*. He described that which was at issue in the courts as "shadows of the just or the representations of which they are the shadows," as opposed to "justice itself" which is gained from "acts of divine contemplation."⁵⁷ St. Anselm made a similar distinction. In the *Monologion*, he argued that God "cannot properly be said to *have* justice, but rather to *exist as* justice," whereas man "cannot *be* justice, but he can *have* justice."⁵⁸

⁵⁵ The Honorable Kevin T. Duffy, *The Need for Values*, N.Y. L.J., May 10, 1995, at 2.

⁵⁶ Cf. BOETHIUS, *supra* note 22, at 169 (explaining that given God's attributes we "live in the sight of a judge who sees all things"); see also *supra* note 35 and accompanying text (giving St. Augustine's view of earthly justice).

⁵⁷ PLATO, *supra* note 24, at 196.

⁵⁸ ANSELM, *supra* note 26, at 30; see also ANSELM, *Cur Deus Homo*, in BASIC WRITINGS 217–21 (S.N. Deane trans., 2d ed. 1962) (arguing that God cannot do anything unjustly and thus could not allow Adam's sin to go unpunished since that would be "unbecoming to God").

Thus, if God is properly viewed as justice,⁵⁹ then man should be able to see God by witnessing that which is *not* justice.⁶⁰ While the everyday goings-on of our legal system might not measure up to the perfect justice of God, they also do not present the most convincing argument for this theory. Rather, it is in the most abysmal decisions and laws—those that move the participants and the spectators alike to cry “injustice”—where man sees just how inferior earthly justice is to that which is justice itself.

The first situation in which such a dynamic takes place, especially amongst the public, is in those cases where it seems that the law is not carried out. Where the law is deemed a just one, and the facts point to an obvious application of that law, then a contrary application is nothing short of an injustice. The most obvious example of this in recent memory was O.J. Simpson’s acquittal on charges of murder. Despite being confronted with a just law, murder,⁶¹ and seemingly overwhelming evidence of

⁵⁹ Under St. Anselm’s test in chapter 15 of the *Monologion*, see *supra* note 26, God would certainly be deemed to be perfect justice, since it would be better to be perfectly just than not to be perfectly just. Another explication of God that would lead to the same conclusion is found in St. Anselm’s *Proslogion*. In chapter 2 of that work, St. Anselm declared that God is “something than which nothing greater can be thought.” ANSELM, *Proslogion*, in *MONOLOGION AND PROSLOGION*, *supra* note 26, at 99. Under this definition, God would also be deemed to be perfect justice since that would be an attribute of the greatest thing that can be thought. The definition also served as the starting point for St. Anselm’s famous ontological argument for God’s existence. See *id.* at 100 (“[I]f that than which a greater cannot be thought exists only in the understanding, then that than which a greater *cannot* be thought is that than which a greater *can* be thought.”); see also DAVIES, *GUIDE AND ANTHOLOGY*, *supra* note 30, at 304–55 (giving examples of ontological arguments and criticisms thereto).

⁶⁰ See LEIBNIZ, *supra* note 27, at 281 (“[W]e only perceive the good of health, and other like goods, when we are deprived of them.”); PLATO, *supra* note 19, at 24–25 (making the same point using “equality”); AUGUSTINE, *The Teacher*, in *PHILOSOPHY IN THE MIDDLE AGES* 20, 30–33 (Arthur Hyman & James J. Walsh eds., 2d. ed. 1973) (positing that God illuminates within our minds the universal forms, and that we compare everything we see against that ideal).

⁶¹ That the prohibition of murder is a just law is important, because it eliminates any argument that the jury might have engaged in nullification in order to show its disapproval of the rule of law. See Tony Perry, *The Simpson Verdicts: Snubbing the Law to Vote on Conscience; History: If Simpson’s Acquittal Was a Message About Racism, Panelists Exercised a Controversial American Legal Tradition: Jury Nullification*, L.A. TIMES, Oct. 5, 1995, at A5 (pointing out that the Simpson verdict could not be pure jury nullification because “no one in their right mind would want to nullify the law against murder”); see also Hodes, *supra* note 45, at 1100–01 (arguing that the verdict was an example of jury nullification of the third kind, which means that the jury believed Simpson was guilty but wanted to send a

guilt, the jury returned a verdict of not guilty. The outrage among many was pronounced, and the palpable sense that injustice had reigned caused many to question whether our justice system was capable of just that—justice.⁶²

An absolutely heart-rending description of the effect that this type of injustice can have on spectators of the legal system is the Bob Dylan song "The Lonesome Death of Hattie Carroll."⁶³ Dylan retold the story of the senseless murder of a hotel maid, Hattie Carroll, at the hands of a Maryland socialite, William Zanzinger. After telling of the senselessness of the murder, the wealth of the perpetrator, and the yeoman's service and life history of the victim, respectively, Dylan repeated the chorus, saying, "But you who philosophize disgrace and criticize all fears,/ Take the rag away from your face. Now ain't the time for your tears."⁶⁴ Dylan then described the trial and the sentence. He wrote:

In the courtroom of honor, the judge pounded his gavel
To show that all's equal and that the courts are on the level
And that the strings in the books ain't pulled and persuaded
And that even the nobles get properly handled
Once that the cops have chased after and caught 'em
And that the ladder of law has no top and no bottom,

message about its displeasure regarding the police investigation). *But see* Charley Reese, *A Jury Isn't Required to Follow the Law in Reaching its Verdict*, ORLANDO SENTINEL, Oct. 10, 1995, at A8 ("No jury is required to follow the law in reaching its verdict.").

⁶² See, e.g., Editorial, *Shed a Tear For Justice*, DAILY NEWS (N.Y.), Oct. 4, 1995, at 28 ("The Trial of the Century has ended in the Travesty of the Century."); John Wildermuth, *A Feeling of Racial Injustice*, S.F. CHRON., Oct. 7, 1995, at A1 ("And now, some are questioning the integrity of the entire justice system."); George Will et al., *What Did O.J. Simpson Trial Tell Us?*, DALLAS MORNING NEWS, Oct. 6, 1995, at 25A ("Life is full of close calls, but the question of O.J. Simpson's guilt wasn't one of them."); see also Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 990 (1996) (stating that the correct and predominant way of viewing the verdict was "one of dismay at an obvious miscarriage of justice, a dismay completely unrelieved by the grand political slogans often trotted out to explain or justify various provisions of the Bill of Rights").

⁶³ Bob Dylan, *The Lonesome Death of Hattie Carroll* (1964), available at <http://bobdylan.com/songs/hattie.html> (last visited Jan. 21, 2005).

⁶⁴ *Id.* According to the song, Hattie Carroll: "Got killed by a blow, lay slain by a cane/ That sailed through the air and came down through the room,/ Doomed and determined to destroy all the gentle. And she never done nothing to William Zanzinger." *Id.* At the time, Carroll was "fifty-one years old and gave birth to ten children" and she "never sat once at the head of the table." *Id.* In contrast, Zanzinger was only twenty-four years old but already "[o]wn[ed] a tobacco farm of six hundred acres." *Id.*

Stared at the person who killed for no reason
 Who just happened to be feelin' that way without warnin'.
 And he spoke through his cloak, most deep and distinguished,
 And handed out strongly, for penalty and repentance,
 William Zanzinger with a six-month sentence.⁶⁵

In response to this grievous injustice, Dylan changed the chorus to read, "Oh, but you who philosophize disgrace and criticize all fears,/ Bury the rag deep in your face/ For now's the time for your tears."⁶⁶ In other words, whereas violence and inequality are common and, to some extent, bearable, injustice is completely different. Its presence makes those who see it realize that justice *itself* has not been accomplished.

The second situation which moves participants and spectators alike to see the insufficiency of earthly justice is when the rule of law itself falls short of being just. This situation, in which the law itself is unjust, presents an even more compelling situation than the one presented above, in which the facts are not properly applied to the law, since in the latter, not even justice as contemplated by the man-made system is achieved.⁶⁷ In this deficient-law situation, man is ruled by what is essentially an unjust law. This condition led Jean-Jacques Rousseau to proclaim, "Man is born free, and everywhere he is in chains."⁶⁸

Examples of rules of law that some have deemed unjust are numerous, and many of them represented landmark constitutional controversies. Instead of simply deciding whether something was constitutional, the examples that follow all involve situations where judges felt that a rule of law was not merely unconstitutional, but unjust.

In the *Dred Scott* case, the Court ruled that individuals whose ancestors had been brought to the United States as slaves could not be deemed citizens and thus could not maintain suit in

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ By this I mean that in the fact situation the onlooker can simply be moved to see injustice by comparing the result with the expected outcome under the rule of law. In Platonic terms, one would see injustice by comparing the outcome of the system with the shadow of justice created by the rule of law. See PLATO, *supra* note 19, at 25. Where the law is deficient, however, the onlooker is moved to see justice *itself* by first seeing the deficiency of the rule of law and then comparing it to perfect justice. See AUGUSTINE, *supra* note 60, at 30-33.

⁶⁸ JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in BASIC POLITICAL WRITINGS 141 (Donald A. Cress trans., Hackett 1987).

federal court.⁶⁹ As slaves, these individuals were merely like other pieces of chattel and "were not intended to be included" among those "created equal" under the Declaration of Independence.⁷⁰ The injustice of this rule of law was explained in a strongly worded dissent by Justice McLean. He wrote, "All slavery has its origin in power, and is *against right*."⁷¹ McLean also pointed to the divine in justifying his outrage. He stated, "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."⁷²

Similar outrage can be found in Justice Harlan's dissent in *Plessy v. Ferguson*. Harlan looked beyond the Constitution in arguing against "separate but equal," and he stated, "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their *right* to do so, and *no government*, proceeding alone on grounds of race, can prevent it without infringing the *personal liberty* of each."⁷³ Harlan concluded that the Court perpetrated a great "wrong this day done"⁷⁴—a wrong that would not be rectified for fifty-eight years. The Court in *Brown v. Board of Education* realized that it had previously announced an unjust law, and it thus determined that "[s]eparate educational facilities are *inherently* unequal."⁷⁵

Like the race cases, those cases dealing with the constitutionality of abortion have evoked strong opinions that go beyond simple constitutional interpretation. Although most of the opinions rely on constitutional arguments, it is clear that far more is at play—namely the issue of whether guaranteeing such a right is just.

⁶⁹ *Scott v. Sandford*, 60 U.S. (1 How.) 393, 404–06 (1857). The Court stated, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws." *Id.* at 405.

⁷⁰ *Id.* at 410 (arguing that if slaves were included amongst that group then "the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted").

⁷¹ *Id.* at 538 (McLean, J., dissenting) (emphasis added).

⁷² *Id.* at 550 (McLean, J., dissenting).

⁷³ *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (emphasis added).

⁷⁴ *Id.* at 562 (Harlan, J., dissenting). It is interesting to note that Harlan's opinion was not completely enlightened. He distinguished African-Americans from Chinese, concluding that the latter were "so different from our own" and thus "absolutely excluded from our country." *Id.* at 561 (Harlan, J., dissenting).

⁷⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (emphasis added).

For example, in *Doe v. Bolton*, Justice White interpreted the majority opinion as concluding that “[d]uring the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus.”⁷⁶ It is clear from that language that White believed that this was more than an issue of interpretation. The same point was well-stated recently by Justice Scalia in his dissent in *Stenberg v. Carhart*, which struck down Nebraska’s partial-birth abortion statute. Scalia wrote, “The notion that the Constitution of the United States, designed, among other things, ‘to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,’ prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.”⁷⁷

Interestingly enough, some of those opinions that have upheld the right to abortion have done so by, in effect, saying that the Constitution required such a result, even though notions of justice might not. For example, the majority opinion in *Stenberg* noted that many would find the procedure “horrifying” and would “recoil at the thought of a law that would permit it,” but that in the end “constitutional law must govern.”⁷⁸ The joint opinion in *Planned Parenthood v. Casey*, which saved the holding in *Roe v. Wade*,⁷⁹ is even more apologetic for the result it reaches. In *Casey*, the Court relied on “the force of *stare decisis*” and its previous “explication of individual liberty” to reaffirm the holding of *Roe*, despite “reservations” and “personal reluctance.”⁸⁰

⁷⁶ *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

⁷⁷ *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (quoting U.S. CONST. pmbl.) (alteration in original).

⁷⁸ *Id.* at 920–21. Justice Stevens’s concurring opinion is an interesting read for no other reason than that he coldly stated that it was “simply irrational” to ban partial-birth abortion since it is no “more akin to infanticide” than are other procedures. *Id.* at 946–47 (Stevens, J., concurring).

⁷⁹ 410 U.S. 113 (1973). The recently released papers of Justice Blackmun reveal that Chief Justice Rehnquist had picked himself to write the majority opinion in *Casey* which would have overruled *Roe*. Justice Kennedy, however, changed his mind, leaving only four justices voting to overrule *Roe*. See *Papers Reveal Roe v. Wade Almost Overturned*, Mar. 4, 2004, available at <http://www.cnn.com/2004/LAW/03/04/scotus.blackmun.papers.ap/index.html> (last visited Feb. 28, 2005).

⁸⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 853, 861 (1992). Of course, the dissent criticized the opinion for relying on *stare decisis*, since it would be ridiculous to require “that a decision be more wrong now than it was at the time it was rendered” in order to overrule it. *Id.* at 955 (Rehnquist, C.J., dissenting).

The opinion stated, "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."⁸¹ Whether or not the authors of these opinions were being genuine,⁸² they do seem to highlight Rousseau's point that the rule of law is not always a just one.

Perhaps no other case better illustrates this point than *DeShaney v. Winnebago County Department of Social Services*. In *DeShaney*, the Court ruled that the Constitution does not require the government to protect its citizens from the actions of private individuals.⁸³ Though this seemed a matter of basic constitutional interpretation, the impassioned dissent of Justice Blackmun recognized this as a grave injustice. Exclaiming "Poor Joshua!", Blackmun urged that a "sympathetic reading" of the Constitution should be adopted which would "comport[] with dictates of fundamental justice and recognize[] that compassion need not be exiled from the province of judging."⁸⁴ Blackmun concluded, "It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded."⁸⁵

⁸¹ *Id.* at 850. *But see id.* at 989–90 (Scalia, J., dissenting) ("It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.").

⁸² One gathers from the dissenting opinions in *Stenberg* that a number of justices did not feel that the *Casey* joint opinion was particularly genuine. *See, e.g., Stenberg*, 530 U.S. at 955 (Scalia, J., dissenting) (describing the *Casey* joint opinion as a "policy-judgment-couched-as-law"); *id.* at 982 (Thomas, J., dissenting).

⁸³ *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195, 202 (1989).

⁸⁴ *Id.* at 213 (Blackmun, J., dissenting); *cf. United States v. Lynch*, 952 F. Supp. 167 (S.D.N.Y. 1997). In *Lynch*, Judge Sprizzo refused to convict an elderly bishop and a young monk of criminal contempt after they violated an injunction barring them from impeding entry into an abortion clinic. Sprizzo, acting as fact-finder, found as a matter of fact that the defendants' "conscience-driven religious belief, precludes a finding of willfulness" and thus determined that the defendants were not guilty. *Id.* at 170. The court stated that the legality of abortion should not bar a justification defense, and it analogized this case to one where a person who may "have violated a court order directing the return of a runaway slave when *Dred Scott* was the law" had a "genuinely held belief that a slave was a human person and not an article of property." *Id.* at 170 n.3. Alternatively, the court found that the defendants' conduct was such that it should not be punished, citing the "prerogative of leniency which a fact-finder has to refuse to convict a defendant" as the justification for its decision. *Id.* at 171.

⁸⁵ *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

As these cases all make clear, sometimes hiding behind the words, or lack thereof, in an historical document is not enough when grave injustice is about to be perpetrated. All legal professionals, and the general public as well, are moved to explications of objective justice in those situations when justice at even its most basic levels is lacking. Although we might not have a "direct pipeline to the Almighty"⁸⁶ that assures us with certainty what justice so requires, we can all strive to locate injustice and seek to learn from it based on the shortcomings that we can discern from it.⁸⁷

CONCLUSION

Sir Thomas Browne composed the *Religio Medici*, in part, as a defense of scientific professions. Browne beautifully documented how his reason, knowledge, and observations led him to have a more profound faith in the existence of God. From the weakness in man that Browne observed, it is possible to construct a cosmological argument for God's existence to which Browne himself seemed to have ascribed.

Throughout history the legal profession has endured its share of reproach. Although Sir Thomas Browne is no longer available to write a stirring defense of its existence, his teachings shine as a ray of hope to anyone interested to learn. Through weakness, one may see strength. Participants in our legal system can bear to learn that our every action stands in sharp contrast to the perfect justice of a perfect God. While our most egregious decisions and laws make clear that a better justice is possible, all of our actions bear witness that we have fallen short of the perfection that our system should strive to draw nearer.

⁸⁶ Duffy, *supra* note 55.

⁸⁷ *But see* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (arguing that there is no "transcendental body of law" that is waiting "to be found").

